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No. 82-2025

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHAVIS TEAL,

Petitioner,

v.

MORRISON-KNUDSEN COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT MORRISON-KNUDSEN COMPANY, INC. IN OPPOSITION

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June 14, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a Federal District Court is required to hold a trial in a Title VII case when the plaintiff is unable to respond to a motion for summary judgment with sworn testimony sufficient to establish a *prima facie* case or to support a finding that the articulated business reasons for his discharge were pretextual.

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OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

The Opinions below, Jurisdiction and Statutes involved are adequately set forth in the Petition for a Writ of Certiorari (hereinafter "Petition").[1]

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[1] Respondent also incorporates by reference the Petition's Appendix, which includes the Judgment of the D.C. Circuit filed November 2, 1982, for which review is sought, and the Memorandum Opinion and Judgment of the District Court, filed December 23, 1981, which was affirmed without opinion below. Petition Appendix (hereinafter "Pet. App.") at 3a, 7a. The Appendix attached to this Brief in Opposition contains a list of all parent, subsidiary and affiliated companies of the Respondent.

STATEMENT OF THE CASE

This case arises under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (1976). From December, 1975 through March, 1976, Petitioner Chavis Teal was employed as an operating engineer by Morrison-Knudsen & Associates (hereinafter "Morrison-Knudsen"), a joint venture that was responsible for completion of two segments of the Washington, D.C. subway system. Pet. App. 7a-8a. In December, 1975, Petitioner Teal was hired by Morrison-Knudsen, through referral from Operating Engineers Local 77 to work as an engineer operating a locomotive. Pet. App. 8a.

On January 28, 1976, Mr. Marschik, Master Mechanic for the Morrison-Knudsen projects, notified Petitioner Teal that he was laid off due to a decline in the need for locomotive operators. Mr. Teal did not allege that this layoff was racially motivated. *Id.* In early February, 1976, Mr. Marschik asked Petitioner to return to work, which he did on February 6, 1976. *Id.* After Petitioner Teal returned to work,[2] Mr. Marschik began to receive complaints that Mr. Teal was not responding to orders of the brakemen when operating a locomotive. Pet. App. 9a.

On March 26, 1976, Mr. Marschik received a written complaint from a shift superintendent, John Freidt, stating that Petitioner Teal "doesn't watch the signals or pay attention to the brakeys and as a result, all the brakeys are afraid to work with him." *Id.*[3] That same day, Mr.

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[2] In the Petition, at p. 3, it is alleged that Petitioner was discriminatorily transferred from one segment of the subway construction project to another in early March and was replaced by a white male. Petitioner offered no evidence to support the claim of replacement by a white male in the District Court. Pet. App. 17a-18a, and did not allege in the Court of Appeals that the District Court erred in its ruling on the transfer issue. Petitioner is therefore foreclosed from raising this claim on Petition for Certiorari. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

[3] In the Petition, as before the District Court and the Court of Appeals, Petitioner Teal does not deny that the complaint was

Leo Pelletier, the Assistant Equipment Superintendent, instructed Mr. Marschik to terminate Petitioner Teal for unsatisfactory performance. *Id.* Shortly thereafter, a meeting was held with representatives of Petitioner's union to discuss the discharge, but no grievance was filed. Pet. App. 9a-10a.

Petitioner Teal filed charges of discrimination with the District of Columbia Office of Human Rights and the Equal Employment Opportunity Commission in 1976 alleging that he was transferred and terminated because of his race. Plaintiff was represented by counsel throughout the lengthy proceedings before the District of Columbia Office of Human Rights. In various pleadings submitted to the District of Columbia Office of Human Rights and the District of Columbia Human Rights Commission, Morrison-Knudsen repeatedly stated that the Plaintiff was replaced by a black person and that he was terminated because his supervisors believed that he was unable to safely operate his locomotive.

The Petitioner filed suit in the United States District Court for the District of Columbia in April, 1981. Judge Flannery set a schedule for discovery and held frequent status conferences. The Petitioner served interrogatories on Morrison-Knudsen and Morrison-Knudsen responded in a timely manner. Petitioner did not engage in any other discovery. At a status conference on September 29, 1981 the parties informed the federal District Court Judge that discovery was complete. Counsel for Respondent informed the Court and Petitioner's counsel that she intended to file a motion for summary judgment. That motion was filed on October 6, 1981 with an affidavit from Mr. Marschik setting forth the circumstances of the Petitioner's employment at Morrison-Knudsen. Petitioner did not file an opposition to the motion for sum-

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written and received, but contends only that he was not at work on the day the complaint was acted upon by Mr. Marschik. *See* Petition at 3, 9, 14a.

mary judgment until November 9, 1981. At the hearing on the motion for summary judgment, Judge Flannery explained to counsel for the Plaintiff the deficiencies in his case and allowed him an additional week in which to file affidavits curing those defects. Notwithstanding the indulgence of the Court, the affidavits submitted by the Plaintiff did not place any of the material facts in dispute.

On December 23, 1981, the District Court entered its Memorandum Opinion and Judgment granting summary judgment to Respondent. Petitioner appealed, and after full briefing and opportunity for oral argument, the Court of Appeals affirmed on the basis of the District Court Opinion. Pet. App. 3a-4a.[4]

On May 15, 1983, Petitioner Teal filed a Petition for a Writ of Certiorari. Petitioner contends that a Writ should issue because the Court of Appeals too "strictly" applied the test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Petitioner also asserts that the decision of the Court of Appeals is in conflict with other courts, and presents an important question of federal law.

REASONS FOR DENYING THE WRIT

1. The Decisions of the District Court and the Court of Appeals Follow the Precedent Set by the Supreme Court in *McDonnell Douglas Corp. v. Green* and *Texas Department of Community Affairs v. Burdine.*

Petitioner alleges that the Court of Appeals and the District Court erred in applying the four part test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Petitioner concedes that the District Court did not woodenly apply *McDonnell Douglas* in this case, but applied a modified test. Petition at 6. The District Court held that Petitioner could establish a *prima facie* case by

[4] The case was submitted without argument only because Petitioner's counsel failed to appear at the scheduled argument.

showing that he was, (1) a member of a racial minority; (2) that he was qualified for a job that he was performing satisfactorily; (3) he was discharged; and (4) he was replaced by a non-minority employee. Pet. App. at 11a. The District Court also noted that courts have held that a plaintiff could also establish the fourth element of the *prima facie* case by proof that non-minority employees with comparable work records were not discharged. *Id.* The District Court found no record evidence to support any finding under any version of the fourth element of the test. Pet. App. 13a-16a.

Petitioner represents that "sworn testimony" was submitted to the District Court supporting his claim of replacement by a white employee. Petition at 7. The only sworn testimony submitted to the Court by the Petitioner was the affidavits of two co-workers. These affidavits did not mention Petitioner's replacement. As the District Court found, Petitioner "adduced *no* facts which suggest that [Petitioner] was, at any time, replaced by a non-minority worker." Pet. App. at 13a. (Emphasis in original).

Notwithstanding the fact that Judge Flannery found no facts which would warrant the shifting of the burden of production to the Respondent, he went on to analyze the case as if the Petitioner had established a *prima facie* case. Pet. App. at 14a-16a. Thus, even had the District Court erred in its application of the *McDonnell Douglas* criteria, this error was harmless. The District Court found that the Respondent had articulated a sound business reason for its decision to terminate the Petitioner and that Petitioner had produced no evidence tending to support a finding of pretext. Pet. App. 14a. Thus, the District Court faithfully followed the formula articulated by the Court in *McDonnell Douglas*, 411 U.S. at 802, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-3 (1981), and followed by the courts. *See, e.g., DeLesstine v. Fort Wayne State Hospital and Train-*

ing Center, 682 F.2d 130 (7th Cir.), *cert. denied*, 103 S.Ct. 378 (1982); *Banerjee v. Board of Trustees*, 648 F.2d 61, 62 (1st Cir.), *cert. denied*, 454 U.S. 1098 (1981); *Welch v. University of Texas*, 659 F.2d 531, 533 (5th Cir. 1981); *Persons v. J.S. Alberici Construction Co., Inc.*, 640 F.2d 916, 919 (8th Cir. 1981); *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1341 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 53 (1982); *Harris v. Group Health Association*, 662 F.2d 869, 872 (D.C. Cir. 1981); *Worthy v. United States Steel Corp.*, 616 F.2d 698, 700 (3d Cir. 1980); *Smith v. University of North Carolina*, 632 F.2d 316, 340-41 (4th Cir. 1980); *Powell v. Syracuse University*, 580 F.2d 1150, 1156 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978); *Jacobs v. Martin Sweets Co., Inc.*, 550 F.2d 364, 371 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977).

2. This Case Does Not Present an Issue on Which the Circuit Courts Are in Conflict, and Does Not Raise an Important Question of Federal Law.

The Petition is based upon the repeated allegations which Petitioner was unable to support with sworn testimony below. The Petitioner states that white employees with worse records than he were retained under the same circumstances which resulted in his discharge. Pet. App. at 8. This statement is devoid of record support and the District Court specifically found to the contrary. Pet. App. at 14a-15a.

Petitioner also implies that he was unable to learn the identity of his replacement. Pet. App. at 7 n.2, 10. Indeed, whenever asked, the Respondent truthfully replied that Petitioner was replaced with Fleming Hughes, a black. Respondent produced sworn testimony to this effect and Petitioner could produce nothing to rebut it. This Petition is based solely on Plaintiff's fervent desire that the facts were different.

Petitioner claims that he proved that he was not at work within two days of his discharge. Even assuming

that this fact alone would be sufficient to raise an inference that the business reasons for discharging him were pretextual, not one iota of proof on this subject was submitted to the District Court judge.

Petitioner is seeking from this Court one more chance to produce evidence which he was unable to produce in almost six years of litigation. Respondent respecfully suggests that the limited resources of the Court would be better spent on a more meritorious case.

CONCLUSION

For the foregoing reasons, Respondent, Morrison-Knudsen Company, Inc., respectfully submits that the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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June 14, 1983

APPENDIX

Respondent Morrison-Knudsen Company, Inc. has the following parent, subsidiary, or affiliated companies:

Atascosa Mining Co.

Broadway Insurance Co. Ltd.

Canadian Rescon Ltd.

Constructora Emkay S.A.

Elk River Explorations Ltd.

Emkay Canada Natural Resources Ltd.

Emkay Development and Realty Co.

Emkay Financial Co. Inc.

H.K. Ferguson Benelux S.A.

The H.K. Ferguson Co.

H.K. Ferguson Co. of Canada Ltd.

H.K. Ferguson Co. of New Zealand Ltd.

The H.K. Ferguson Engineering Co.

H.K. Ferguson International Co.

Ferguson-Morris-Knudsen River Ltd.

High Rock Mining Co. Ltd.

IECO-Afrique Centrale, S.P.R.L.

Internacional de Engenharia S.A., Cia.

International Engineering Co. Inc.

International Engineering Co. of New York, Inc.

International Power Systems Inc.

M-K International Mining Co. Inc.

M-K National Corp.

M-K Railroad Equipment Leasing Co. Inc.

M-K.-River Constructie Mij., B.V.

Morrison-Knudsen of Arabia Inc.

The Morrison-Knudsen Co. of New Zealand Ltd.
Morrison-Knudsen Enginharia, S.A.
Morrison-Knudsen Forest Products Co. Inc.
Morrison-Knudsen International Co. Inc.
Morrison-Knudsen Pacific Ltd.
National Steel and Shipbuilding Co.
Northern Construction Co. Ltd.
Wabash Valley Railroad Co.
Western Aircraft Maintenance Inc.
Westmoreland Resources, Inc.
Yampa Mining Co.